

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB JULY 14, 00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re PageMart, Inc.

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Serial No. 74/507,720

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William A. Munck of Novakov Davis, P.C. for PageMart, Inc.  
Rene M. LaForte, Trademark Examining Attorney, Law Office 106  
(Mary Sparrow, Managing Attorney).

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Before Cissel, Hanak and McLeod, Administrative Trademark  
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On March 31, 1994, applicant applied to register the mark  
"INFONOW" on the Principal Register for "data and voice  
telecommunications services," in Class 38. The application was  
subsequently amended to state applicant's services as follows:  
"telecommunications services, namely, providing prompt  
subscriber-oriented wireless message paging services via  
message pagers." Applicant claimed use of this mark in

interstate commerce in connection with the specified services since November 1, 1993.

This application is now before the Board on appeal from the final refusal to register under Section 2(d) of the Lanham Act on the ground that applicant's mark, as used in connection with the services specified in the application as amended, so resembles the mark "INFO NOW," which is registered<sup>1</sup> for "promoting the goods and services of others by providing reader response, business information, and advertising via telephone, facsimile transmissions, and interactive computer systems; computerized database management services; computerized information storage and retrieval services," in Class 35; and for "communications services; namely, the electronic transmission of messages and data, and network broadcasting services by means of remote online interactive computer terminals and telephone modems, cable modems and modem bypass equipment," in Class 38, that confusion is likely.

Both applicant and the Examining Attorney filed appeal briefs, but applicant did not request an oral hearing before the Board. Accordingly, we have resolved this appeal based upon the written arguments and the record established by the application file.

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<sup>1</sup> Reg. No. 2,022,705 was issued on Dec. 17, 1996 to Global Villages, Inc., based on a claim of use in commerce since 1987.

Based on careful consideration of these materials, the statute, and relevant legal precedent on this issue, we find that the Examining Attorney has met her burden of proof by establishing that confusion is likely in this case.

Our primary reviewing court listed the factors to be considered in resolving the issue of likelihood of confusion under the Lanham Act in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two of the most important considerations are the similarities between the marks and the similarities between the goods or services. We must first look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. If the marks are similar, then we must compare the goods or services to determine if they are commercially related or if the activities surrounding their marketing are such that confusion is likely if similar marks are used in connection with both. *International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). If there has been any opportunity for incidents of actual confusion to have occurred, whether or not they have is a factor which should also be considered.

In the case at hand, confusion is likely because applicant's mark is almost identical to the registered mark and the services specified in the application are related to the services set forth in the cited registration.

To begin with, as noted above, these marks are very nearly identical to each other. They are similar in appearance, pronunciation, connotation and commercial impression. The only difference is that the registered mark is presented with a space before the final syllable, whereas applicant's mark has no space there. This represents a distinction without a difference. These two marks are not identical, but they are very close to being the same. Under these circumstances, the services of the respective parties need not be as closely related to support a finding of likelihood of confusion as might be the case if differences of any significance existed between the marks. *Amcor, Inc. v. Amcor Industries, Inc.* 210 USPQ 70 (TTAB 1981).

Applicant argues that the cited registered mark is weak because many other registered service marks in Class 38 include terms which begin with the prefix "info," or include the word "now." As the Examining Attorney points out, however, applicant has not included any evidence in support of the proposition that registrant's mark is weak in the field of telecommunication services. Applicant argues that three particular service mark registrations support this argument, but we have no evidence establishing the existence of these registrations. Moreover, the goods and services for which applicant asserts these marks are registered do not appear to

be closely related to the services at issue in this appeal. In any event, even if applicant had made of record evidence which established that the cited registered mark is weak in the field of telecommunications by virtue the widespread use of other marks incorporating similar components in the same field of commerce, even such a weak mark would be entitled to protection against the registration of a mark which is nearly identical to it for services which might be reasonably assumed to emanate from the same entity.

Turning, then, to consideration of the services at issue in this appeal, as noted above, the amended application specifies applicant's services as "telecommunications services, namely, providing prompt subscriber-oriented wireless message paging services via message pagers," in Class 38. The services listed in the registration include "communication services; namely, the electronic transmission of messages and data, and network broadcasting services by means of remote online interactive computer terminals and telephone modems, cable modems and modem bypass equipment," in Class 38.

Applicant's paging services are encompassed within the broad terminology used to describe registrant's communication services. Simply put, paging services constitute the electronic transmission of messages. At a minimum, wireless message paging services are closely related to the service of

transmitting messages and data electronically. These services typically emanate from a single source, and they share the same channels of trade and customers.

Applicant argues that the registration's recitation for the services in Class 38 is unclear because the phrase "electronic transmission of messages and data" is not the common name of any communications service and does not identify registrant's services with particularity. In view of this fact, argues applicant, the Board should limit the registration's recitation of services in Class 38 by ignoring the words "electronic transmission of messages and data," so that the recitation would read "communications services, namely network broadcasting services..." After we have done this, applicant would have us conclude that the registrant is not a telecommunications company, but rather is a "content provider" who is online to the general public, and therefore that the registrant's channels of trade and customers are different from those of applicant.

Contrary to applicant's arguments, however, it is clear that the services set forth in the registration are similar to those specified by applicant in the instant application. It is well settled that the issue of likelihood of confusion must be resolved on the basis of the respective recitations of services in the application and the cited registration, without

limitations or restrictions that are not reflected therein. Toys "R" Us, Inc. v. Lamps R Us, 219 USPQ 340, 343 (TTAB 1983) and cases cited therein. Registrant's services are "communication services; namely, the electronic transmission of messages and data..." Applicant's telecommunications services consisting of wireless message paging services via message pagers are encompassed within the recitation of services in the registration.

The Examining Attorney has made of record a sampling of twenty-four third-party registrations of marks registered for both paging services and other electronic transmission services. These registrations serve to suggest that the services listed therein may emanate from a single source. In re Albert Trostel & Sons Company, 29 USPQ2d 1783 (TTAB 1993). They demonstrate that telecommunications service providers can be expected to offer a variety of communications services ranging from providing cellular telephone and pager services to providing access to the Internet. Consumers who are familiar with registrant's "INFO NOW" communications services, which include electronic transmission of messages and data, are likely to believe, upon encountering applicant's virtually identical mark, "INFONOW," for paging services, that these closely related services are provided by the same business.

Applicant's statement that no actual confusion has taken place is not persuasive of a different conclusion. Applicant has not provided us with any information establishing that there has been any appreciable opportunity for confusion to have occurred. We have no idea of the quantity or geographical extent of the sales or promotion of either applicant's or registrant's services. In any event, evidence of actual confusion is notoriously hard to come by, and such evidence has never been a required element of proof in establishing likelihood of confusion. The issue is not whether confusion has occurred, but rather whether it is likely.

Any doubt regarding whether confusion is likely must be resolved in favor of the prior registrant and against applicant, who had a duty to select a mark which is not likely to cause confusion with a mark which is already in use. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

For the reasons set forth above, the refusal to register under Section 2(d) of the Lanham Act is affirmed.

R. F. Cissel

E. W. Hanak



**Ser No.** 507,720

L. K. McLeod  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

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